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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1310

SAM DEAN,

Petitioner

v.

THE GADSDEN TIMES PUBLISHING CORPORATION, a corporation,

Respondent

## BRIEF OF THE STATE OF ALABAMA AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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### INTEREST OF THE STATE OF ALABAMA

The action of the Alabama judiciary in declaring unconstitutional Title 30, Section 7(1), Code of Alabama 1940, profoundly effects the operation of the jury system in the State of Alabama. The striking of this statute will greatly decrease the caliber and quality of Alabama juries and is to the general determinent of the State. Therefore, the State of Alabama, by and through the Attorney General, files this brief in support of the Petition for a Writ of Certiorari.

## STATEMENT OF THE CASE

Title 30, Section 7(1), Code of Alabama 1940, requires all Alabama employers to pay any employee called to serve as a juror his full salary, less the fee paid jurors by the State. The constitutionality of the statute was raised as a result of an action by the Petitioner, an employee, against his employer to recover that part of his salary lost while serving as a juror. The trial court rendered a verdict for the Petitioner for the amount sued for. The case was appealed to the Alabama Court of Civil Appeals which reversed and on August 23, 1972 entered a judgment striking the statute as violative of the Fourteenth Amendment of the United States Constitution. Petition for Rehearing was denied on September 20, 1972. The Supreme Court of Alabama denied certiorari on October 19, 1972 and a timely petition for rehearing of the petition was denied on November 30, 1972.

## REASONS FOR GRANTING THE WRIT

This decision is clearly contrary to a prior ruling by the United States Supreme Court in the case of *Day-Brite Lighting Company v. Missouri*, 342 U.S. 421, 96 L.Ed. 469, 72 S.Ct. 405 (1952). In *Day-Brite*, a Missouri statute requiring employers to pay all employees full salary during a four hour period in which employees were entitled to absent themselves from work for the purpose of voting, was challenged on grounds that it violated the constitutional guarantees of due process and equal protection. The issue in the *Day-Brite* case was almost identical with the one presented by the instant case: Whether a state, through duly enacted legislation, may compel employers to compensate employees for time taken from work to perform a civic duty even though the employees rendered no service to the employer during this

time.[1] The United States Supreme Court, through Justice Douglas, held that the statute was not rendered unconstitutional by the fact that the employer was required to compensate the employee for a period of time during which the employee performs no service, and that such compulsion was justified under the State's inherent police power to pass regulations for the good of the general public. Since this Court has held constitutional a state statute requiring an employer to pay an employee for time off for voting, it would seem incumbent on this Court to hold constitutional a statute compelling payment for time lost while serving on a jury. Certainly the interest of the state in having the populace vote cannot be greater or more pressing than the interest of the state in having the populace serve as jurors. In fact, to the extent that there is a distinction, it lies in the fact that while voting is the responsibility of every citizen the state does not compel its citizens to vote; but the state does compel jury duty, thus making the need for state compelled compensation more emphatic in the instant case than in the *Day-Brite* decision.

It is argued, however, that *Day-Brite* may be distinguished from the instant case in that the statute under consideration in *Day-Brite* was enacted to insure that employers

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[1] The Court of Civil Appeals has succinctly stated the issue in the instant case:

> "This dispositive question presented by this appeal as we view it is whether or not an employer's constitutional rights are violated when he, the employer, is required to pay his employee, during this absence from work while performing jury duty, his usual compensation for such employment less the fee or compensation the employee receives for serving as a juror, where such employer, naturally, during the absence, receives no services from the employee."

Compare the above with the following statement from **Day-Brite.**

> "The only semblance of substance in the constitutional objection to Missouri's law is that the employer must pay wages for a period in which the employee performs no services."

did not "use their power over employees' wages to coerce them in voting." While the object of the Alabama statute was merely "to insure that those rendering services to the state receive adequate compensation."[9] Surely the fallacious reasoning of this argument is obvious. There is no reason why an employer could not use his position to influence an employee called as a juror just as much as he could influence an employee on election day. The potential for coercion of employees by employers is no less great in this instance than in the *Day-Brite case*. Furthermore, there can be no question that at least a secondary objective of the Missouri statute was to adequately compensate those rendering services to the state, to insure, so far as possible, that citizens do not suffer economic loss because they perform their civic duty. As Justice Jackson pointed out in his dissent in *Day-Brite*, the statute fails to compensate those who are self-employed, but surely it is evident that there is a far greater certainty of loss on the part of a juror or voter who is on salary than on the part of those who own their own business or are otherwise self-employed.

The Alabama judiciary has refused to follow *Day-Brite*, a United States Supreme Court decision directly in point, and relies instead on a decision by the Supreme Court of Hawaii, *Hasegawa v. Maui Pineapple Company*, 475 P.2d 679, and the case of *Coppage v. Kansas*, 236 U.S. 1, which was treated in *Day-Brite* as having been overruled.

The *Hasegawa* case involved a statute which required an employer to pay an employee full salary for any time spent on serving on a jury, or on a public board. The facts of the

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[9] 288 So.2d at 832. It is not clear if the Alabama Court of Appeals is drawing this distinction or merely referring to a distinction drawn by the Supreme Court of Hawaii.

case were that an employee of Appellant sought compensation for his service on a liquor commission. The Supreme Court of Hawaii held the statute compelling compensation unconstitutional on grounds that it violated due process and equal protection.

It is highly likely that the *Hasegawa* opinion is contrary to *Day-Brite*, but even if it be considered not to be in conflict, it would still not be even persuasive authority in the instant case since it is readily distinguishable on its facts and on the basis of the policy considerations involved. Alabama's statute has no provision requiring compensation for service on a public board, but is limited solely to payment of jurors. There may well be some question as to the constitutionality of compelled compensation for public board members since service on such boards is voluntary and one could volunteer for services on so many boards that he performed no service for his employer, but could still receive his regular wage. Jury duty is, on the other hand, compulsory unless excused by the court and very infrequent. Furthermore, there can be no question but that the interest of the state in compensating public board members and jurors is not the same since, service on a public board being voluntary, the hardship of imposing wage loss to a member of a public board cannot be equated with that imposed on a juror.

In reaching this decision the Alabama Court of Civil Appeals also relied on the case of *Coppage v. Kansas*, supra. While it cannot be said that *Day-Brite* specifically overruled *Coppage*, the majority clearly questioned its philosophical soundness and treated the judicial position represented by that decision as one the judiciary had advanced beyond. At one point Justice Douglas said the following: "We could strike down this law (the Missouri statute) only if we re-

turned to the philosophy of the Lochner, Coppage and Adkins cases."

It is also interesting to note that in many respects the opinion by the Alabama Court of Civil Appeals sounds disturbingly like a paraphrase of Justice Jackson's dissent in *Day-Brite*. The Court of Appeals relies upon the following argument in striking down the Alabama statute:

> "It should be noted that the act in question applies to all employers; the corporate employer, the small businessman, the corner service station, the housewife who is fortunate enough to employ full-time domestic help, and to require these persons to supplement jury pay while exempting others from bearing their proportionate share of this essential function is, to this court, unconstitutional.
>
> "There is no question but that it is the right of every union, negotiating with an employer, to bargain for no loss of pay while its members are serving as jurors. It is also the right of an individual employee to make the matter in question a condition of his employment, but we do not believe the constitution allows the state to require the same of an employer."

Compare the above with the argument advanced by Justice Jackson in his dissent:

> "The Court, by speaking of the statute as though it applies only to industry, sinister and big, further obscures the real principle involved. The statute plainly requires farmers, small service enterprises, professional offices, housewives with domestic help, and all other employers, not only to allow their employees time to vote, but to pay them for time to do so.
>
> * * *

"It undoubtedly is the right of every union negotiating with an employer to bargain for voting time without loss of pay. It is equally the right of any individual employee to make that part of his hire.

* * *

"But a constitutional philosophy which sanctions intervention by the State to fix terms of pay without work may be available tomorrow to give constitutional sanction to state-imposed terms of employment less benevolent."

In conclusion, it should be brought to the Court's attention that the burden imposed on the employer by this statute is minimal compared to the benefit to the general public and the State of Alabama.

Jury service in the State of Alabama is an infrequent duty. The time which an employee would be absent would only be the length of the court term or the length of the trial. Court terms in Alabama are generally for one week, and most trials last only one or two days. Thus, the burden would be both infrequent and modest, while the benefits to the State and its judicial system are extensive and far reaching. This legislation will unquestionably result in an overall increase in the caliber of Alabama juries. Our more highly paid and highly educated citizens will not try to avoid jury duty because of the financial sacrifice which would otherwise be imposed. On the other hand the statute encourages a better representation of Black people and subsistence income level citizens since they could then serve without total disruption of their financial situation.

The extensive benefits of the statute are obvious and

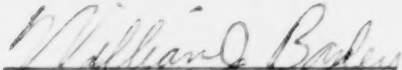
should be more than sufficient to outweigh the minimal burden on employers.

## CONCLUSION

The question presented by this case is quite simply whether an employer's constitutional rights are violated by a statute which requires the employer to compensate an employee who is absent while performing a public service; the employer, of course, receiving no services from the employee during his absence. The *Day-Brite* decision clearly holds that such a statute is not constitutionally invalid. However, the Alabama courts have refused to follow this decision of the United States Supreme Court and has chosen to rely upon a decision by the Supreme Court of Hawaii and an older decision of this Court, the philosophy of which has long since been abandoned.

For the reasons set forth above and because this is an issue which will have such far reaching effects on the judicial system and the quality of justice in the State of Alabama, the State respectfully requests that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,



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## PROOF OF SERVICE

I, L. G. Kendrick, Assistant Attorney General for the State of Alabama, depose and say that on the 26 day of March, 1973, I served a copy of the foregoing Brief of the State of Alabama as Amicus Curiae in Support of the Petition for a Writ of Certiorari on respondent herein, by placing said copy in the mail, postage prepaid, and properly addressed to Honorable George Ford, of the law firm of Dortch, Wright & Ford, 307 Broad Street, Gadsden, Alabama, attorneys of record for the respondent herein.

L. G. Kendrick

L. G. KENDRICK

Subscribed and sworn to before me, this 26 day of March, 1973.

Louise T. Norrell

NOTARY PUBLIC, STATE OF ALABAMA AT LARGE